



**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R05-OAR-2022-0976; FRL-10788-03-R5]**

**Air Plan Approval; Michigan; Interim Final Determination To Stay  
and Defer Sanctions in the Detroit Sulfur Dioxide Nonattainment  
Area**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Interim final rule.

**SUMMARY:** In the Proposed Rules section of this *Federal Register*, EPA is proposing conditional approval of Michigan's State Implementation Plan (SIP), as revised on December 20, 2022, for attaining the 2010 1-hour primary sulfur dioxide (SO<sub>2</sub>) national ambient air quality standard (NAAQS). Based on that proposed conditional approval, EPA is making an interim final determination (IFD) by this action. Although this action is effective upon publication, EPA will take comment on this interim final determination.

**DATES:** This interim final determination is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. However, comments will be accepted until **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R05-OAR-2022-0976 at <https://www.regulations.gov>, or via email to [arra.sarah@epa.gov](mailto:arra.sarah@epa.gov). For comments submitted at Regulations.gov, follow the online instructions for submitting

comments. Once submitted, comments cannot be edited or removed from Regulations.gov. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Abigail Teener, Environmental Engineer, Attainment Planning and Maintenance Section, Air Programs Branch (AR 18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353-7314, [teener.abigail@epa.gov](mailto:teener.abigail@epa.gov). The EPA Region 5 office is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID-19.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

On March 19, 2021, EPA partially approved and partially disapproved Michigan's SO<sub>2</sub> plan for the Detroit area as submitted in 2016 (86 FR 14827). EPA approved the base-year emissions inventory and affirmed that the new source review (NSR) requirements for the area had previously been met on December 16, 2013 (78 FR 76064). EPA also approved the enforceable control measures for two facilities as SIP strengthening. EPA disapproved the attainment demonstration, as well as the requirements for meeting reasonable further progress (RFP) toward attainment of the NAAQS, reasonably available control measures and reasonably available control technology (RACM/RACT), and contingency measures. Additionally, EPA disapproved the plan's control measures for two facilities as not demonstrating attainment. EPA's March 19, 2021, rulemaking triggered the sanctions clock as outlined in section 179 of the Clean Air Act (CAA) and 40 CFR 52.31(d). The two-to-one new source offset sanction took effect on October 19, 2022 (18 months following the effective date of March 19, 2021 rulemaking that triggered the sanctions clock), and the highway funding sanction was scheduled to take effect on April 19, 2023 (6 months after the date of the offset sanctions), in the Detroit nonattainment area as the result of the March 19, 2021, partial disapproval.

On October 12, 2022, EPA promulgated a Federal Implementation Plan (FIP) for the Detroit SO<sub>2</sub> nonattainment area (87 FR 61514), which satisfied EPA's duty to promulgate a FIP for the area under CAA section 110(c) that resulted from the previous finding of failure to submit. However, it did not affect the sanctions clock started under CAA section 179 resulting from EPA's partial disapproval of the prior SIP, which would be permanently stopped only by meeting the conditions of EPA's regulations at 40 CFR 52.31(d)(5). On December 20, 2022, Michigan submitted a revised attainment plan for the Detroit SO<sub>2</sub> nonattainment area mirroring EPA's FIP in order to remedy Michigan's 2016 plan deficiencies, as specified in EPA's March 19, 2021 rulemaking. Michigan's December 20, 2022, plan depends, in part, on permits that have not yet been issued but will include SO<sub>2</sub> limits and associated requirements for the U.S. Steel and Dearborn Industrial Generation (DIG) facilities that are no less stringent than those set forth in EPA's FIP for the Detroit nonattainment area.

Under section 110(k)(4) of the CAA, EPA may conditionally approve a plan based on a commitment from the State to adopt specific enforceable measures within one year from the date of approval, accompanied by a schedule for adoption of those measures. EPA's October 28, 1992, memorandum, entitled "State Implementation Plan (SIP) Actions Submitted in Response to Clean Air Act (Act) Deadlines," states that such commitments should include a formal request that EPA approve the commitment, be

subject to public hearing pursuant of 40 CFR 51.102, and include a schedule for the adoption of the required measures.

Therefore, Michigan included in its December 20, 2022, submittal, which was subject to public hearing, a request that EPA conditionally approve its revised plan for the Detroit area, conditional upon the issuance and submission for incorporation into the SIP of the NSR permits for the U.S. Steel and DIG facilities, as well as a commitment to submit the permits to EPA within one year of a conditional approval. On February 21, 2023, Michigan submitted a letter clarifying the schedule for the conditional approval, including Michigan's commitment to submit the necessary permits by April 30, 2024, and the schedule Michigan expects to follow to meet that commitment. Michigan's expected schedule includes ensuring all necessary permit applications are submitted by March 31, 2023, beginning the 240-day permit review process by April 1, 2023, issuing permits by December 1, 2023, and submitting permits to EPA by December 31, 2023. Michigan's expected date of submittal provides some additional time to accommodate unexpected delays to ensure the State is able to meet its commitment to submit the permits by April 30, 2024, and EPA finds that Michigan's schedule is reasonable.

In the Proposed Rules section of this *Federal Register*, EPA has proposed to conditionally approve Michigan's December 20, 2022, plan, pending the timely submittal of the specified permits by April 30, 2024. Regardless, the limits and

associated requirements needed to provide for attainment of the SO<sub>2</sub> NAAQS in the Detroit area are federally enforceable via EPA's FIP, codified at 40 CFR 52.1189.

## **II. What action is EPA taking?**

Under 40 CFR 52.31(d)(2)(ii), if the State has submitted a revised plan to correct the deficiency, and EPA proposes to conditionally approve the plan and issues an IFD that the revised plan corrects the deficiency, application of the new source offset sanction shall be stayed and application of the highway sanction shall be deferred. In the Detroit area, the offset sanction was imposed on October 19, 2022, and the highway sanction, if not deferred, would be imposed on April 19, 2022.

Based on the proposed conditional approval of Michigan's SO<sub>2</sub> plan for the Detroit nonattainment area set forth in this *Federal Register*, EPA believes that it is more likely than not that Michigan has met the requirement to submit a plan that provides for attainment of the 1-hour SO<sub>2</sub> NAAQS for the Detroit SO<sub>2</sub> nonattainment area under sections 110, 172, 191, and 192 of the CAA. Therefore, EPA is making this IFD finding that the State has corrected the deficiency of failing to submit a plan that provides for attainment of the SO<sub>2</sub> NAAQS in the Detroit nonattainment area, contingent on the adoption and timely submittal of permits containing SO<sub>2</sub> limits and associated requirements for the U.S. Steel and DIG units in the area that are no less stringent than those limits and requirements set forth in EPA's FIP for the Detroit area, codified at 40 CFR

52.1189. These limits and requirements will remain federally enforceable via EPA's FIP, codified at 40 CFR 52.1189, unless EPA fully approves Michigan's plan and incorporates the appropriate permits into Michigan's SIP and takes further action to rescind the FIP.

EPA also believes that this approach is consistent with the requirements of section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)(3)).<sup>1</sup> Generally, under the APA, agency rulemaking affecting the rights of individuals must comply with certain minimum procedural requirements, including publishing a notice of proposed rulemaking in the *Federal Register* and providing an opportunity for the public to submit written comments on the proposal, before the rulemaking can have final effect. EPA will not be providing an opportunity for public comment before those deferrals or stays are effective. Consequently, EPA's approach may appear to conflict with the requirements of the APA. However, EPA will provide an opportunity to comment on the proposed conditional approval that was the basis for the interim final determination and will provide an opportunity, after the fact, for the public to comment on the interim final determination. Thus, an opportunity for comment will be provided before any sanctions clock is permanently stopped or any already applied sanctions are permanently lifted. In the context of the conditional

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<sup>1</sup> See also further analyses described in EPA's August 4, 1994 rulemaking on the Selection of Sequence of Mandatory Sanctions (59 FR 39832, 39849-53), available at [https://archives.federalregister.gov/issue\\_slice/1994/8/4/39826-39866.pdf#page=7](https://archives.federalregister.gov/issue_slice/1994/8/4/39826-39866.pdf#page=7)

approval, and with respect to the interim final rule, the public would have an opportunity to comment on the appropriateness of EPA's interim determination that the State had corrected the deficiency and on whether the State should remain subject to sanctions, even though the deferral or stay is already effective.

The basis for allowing such an interim final action stems from section 553(b) (B) of the APA which provides that the notice and opportunity for comment requirements do not apply when the Agency finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." In the case of sanctions, EPA believes it would be both impracticable and contrary to the public interest to have to propose and provide an opportunity to comment before any relief is provided from the effect of sanctions. EPA believes it would be unfair to the State and its citizens, and thus not in the public interest, for sanctions to remain in effect following the proposed conditional approval, since EPA has completed a thorough evaluation of the State's SIP revision and publicly stated its belief that the submittal is approvable, conditional upon the submittal of the appropriate permits, and that the State has corrected the deficiency, but due to the State permitting procedural requirements the State has not yet been able to adopt the necessary permits. While EPA cannot incorporate permits containing emission limits and associated requirements for the U.S. Steel and DIG limits into Michigan's SIP at this time,



these limits and associated requirements were previously established in EPA's FIP and will continue to remain federally enforceable as part of the regulatory text of EPA's FIP, codified at 40 CFR 52.1189. EPA believes sanctions coming into effect following the proposed conditional approval would unnecessarily risk potential dislocation in government programs and the marketplace. EPA also believes that the risk of an inappropriate deferral or stay would be comparatively small, given the limited scope and duration deferrals and stays would have and given the rule's mechanism for making sanctions effective upon reversal of its initial determination that the State had corrected the deficiency. Consequently, EPA believes that the "good cause" exception under the APA allows the Agency to dispense with notice and comment procedures before deferrals and stays of sanctions become effective.

In accordance with 5 U.S.C. 553(d) of the APA, EPA finds there is good cause for this action to become effective immediately upon publication. The immediate effective date for this action is authorized under both 5 U.S.C. 553(d)(1).

Section 553(d)(1) of the APA provides that final rules shall not become effective until 30 days after publication in the *Federal Register* "except . . . a substantive rule which grants or recognizes an exemption or relieves a restriction." The purpose of this provision is to "give affected parties a reasonable time to adjust their behavior before the final rule

takes effect." *Omnipoint Corp. v. Fed. Commc'n Comm'n*, 78 F.3d 620, 630 (D.C. Cir. 1996); see also *United States v. Gavrilovic*, 551 F.2d 1099, 1104 (8th Cir. 1977) (quoting legislative history). However, when the agency grants or recognizes an exemption or relieves a restriction, affected parties do not need a reasonable time to adjust because the effect is not adverse. Because this rule relieves a restriction, EPA finds good cause under 5 U.S.C. 553(d)(1) for this action to become effective on the date of publication of this action.

Under 40 CFR 52.31(d)(2)(ii), if the State does not meet its commitment and the plan is disapproved, the new source offset sanction shall reapply and the highway sanction shall apply on the date of proposed or final disapproval.

### **III. Statutory and Executive Order Reviews**

This action stays and defers Federal sanctions and imposes no additional requirements.

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

This action is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

This action does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4).

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999).

This rule does not have tribal implications, as specified in Executive Order 13175 because it will not have substantial direct effects on tribal governments. Thus, Executive Order 13175 does not apply to this rule.

This action is not subject to Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not an economically significant regulatory action.

This action is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

This rulemaking does not involve technical standards. Therefore, the EPA is not considering the use of any voluntary consensus standards.

EPA believes that this action does not have

disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994).

This action is subject to the Congressional Review Act, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. However, section 808 provides that any rule for which the issuing agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, shall take effect at such time as the agency promulgating the rule determines. 5 U.S.C. 808(2). EPA has made such a good cause finding, including the reasons thereof, and established an effective date of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its

requirements. See section 307(b)(2).

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control,  
Incorporation by reference, Intergovernmental relations,  
Reporting and recordkeeping requirements, Sulfur oxides.

Dated: March 16, 2023.

Debra Shore,  
*Regional Administrator, Region 5.*

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